No. 92-486

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

EDGE BROADCASTING COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF BROADCASTERS; AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.; AMERICAN CIVIL LIBERTIES UNION; DOW JONES & COMPANY; GANNETT CO., INC.; THE HEARST CORPORATION; MAGAZINE PUBLISHERS OF AMERICA, INC.; THE MEDIA INSTITUTE; MULTIMEDIA BROADCASTING COMPANY; NATIONAL BROADCASTING COMPANY, INC.; NEWSPAPER ASSOCIATION OF AMERICA; NORTH CAROLINA ASSOCIATION OF BROADCASTERS, INC.; POST-NEWSWEEK STATIONS, INC.; PROVIDENCE JOURNAL COMPANY; SOCIETY OF PROFESSIONAL JOURNALISTS; TIME INC.; TRIBUNE COMPANY; AND WESTINGHOUSE BROADCASTING COMPANY, INC., IN SUPPORT OF RESPONDENT

Of Counsel:
HENRY L. BAUMANN
Executive Vice President
and General Counsel
STEVEN A. BOOKSHESTER
Associate General Counsel
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 "N" Street, N.W.
Washington, D.C. 20036
Attorneys for National Association of Broadcasters

P. CAMERON DEVORE *
MARSHALL J. NELSON
SIMA F. SARRAFAN
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

(List of Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

JOHN KAMP
AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.
1899 L Street, N.W.
Washington, D.C. 20036
Attorney for American Association of Advertising Agencies, Inc.

STEVEN R. SHAPIRO
JOHN A. POWELL
AMERICAN CIVIL LIBERTIES UNION
132 West 43 Street
New York, NY 10036
Attorneys for American Civil Liberties Union

STUART D. KARLE
DOW JONES & COMPANY, INC.
200 Liberty St.
New York, NY 10028
Attorney for Dow Jones & Company, Inc.

BARBARA W. WALL
GANNETT CO., INC.
1100 Wilson Boulevard
Arlington, Virginia 22234
Attorney for Gannett Co., Inc.

VICTOR F. GANZI
ROBERT J. HAWLEY
THE HEARST CORPORATION
959 8th Ave.
New York, NY 10019
Attorneys for The Hearst Corporation

KENNETH M. VITTOR
SLADE R. METCALF
C/O MAGAZINE PUBLISHERS OF AMERICA, INC.
575 Lexington Ave.
New York, NY 10022
Attorneys for Magazine Publishers of America, Inc.

RICHARD E. WILEY
DANIEL E. TROY
WILEY, REIN & FIELDING
1776 "K" Street, N.W.
Washington, D.C. 20006
Attorneys for The Media Institute

DAVID P. FLEMING
Vice President and General Counsel
MULTIMEDIA BROADCASTING COMPANY
701 E. Douglas, Union Station
Wichita, KS 67202
Attorney for Multimedia Broadcasting Company

ROBERTA R. BRACKMAN
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
Room 1022
New York, NY 10112
Attorney for National Broadcasting Company, Inc.

JOHN F. STURM
RENÉ P. MILAM
NEWSPAPER ASSOCIATION OF AMERICA
11600 Sunrise Valley Dr.
Reston, VA 22091
Attorneys for Newspaper Association of America

WADE H. HARGROVE
MARK J. PRAK
THARRINGTON, SMITH & HARGROVE
209 Fayetteville Street
Raleigh, N.C. 27602
Attorneys for North Carolina Association of Broadcasters, Inc.

BEST AVAILABLE COPY

L. STANLEY PAIGE
POST-NEWSWEEK STATIONS, INC.
1150 15th Street, N.W.
Washington, D.C. 20071
Attorney for Post-Newsweek Stations, Inc.

MICHAEL B. ISAACS
PROVIDENCE JOURNAL COMPANY
75 Fountain St.
Providence, RI 02902
Attorney for Providence Journal Company

BRUCE W. SANFORD
HENRY S. HOBERMAN
ROBERT D. LYSTAD
BAKER & HOSTETLER
Washington Square
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for the Society of Professional Journalists

HARRY M. JOHNSTON III
TIME INC.
1271 Avenue of the Americas
New York, NY 10020
Attorney for Time Inc.

DAVID D. HILLER and
CHARLES J. SENNET
TRIBUNE COMPANY
435 North Michigan Ave.
Suite 2010
Chicago, IL 60611
Attorneys for Tribune Company

MARTIN P. MESSINGER
BRYAN T. MCGINNIS
WESTINGHOUSE BROADCASTING COMPANY, INC.
888 Seventh Ave., 39th Floor
New York, NY 10106
Attorneys for Westinghouse Broadcasting Company, Inc.

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STATEMENT OF INTEREST

Amici are national and local broadcasters, newspaper and magazine publishers, associations representing the media and journalists, and associations defending civil

liberties under the First Amendment. These groups share a continuing commitment to preserving First Amendment protection for all forms of lawful speech, and have often appeared before the Court to argue the broadest protection for commercial speech.*

In this case, Amici wish to respond to the aggressive arguments of the Petitioners, which, if accepted by this Court, not only would undermine the carefully balanced four-part test adopted by this Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) and applied thereafter in a substantial body of cases, but could effectively signal the end of First Amendment protection for commercial speech. Amici believe that government's only legitimate role in the regulation of commercial advertising in a pluralistic society is to assist consumers in receiving truthful, nonmisleading information to aid in their making informed choices about lawful products and services. To utilize advertising speech regulation as a back door method of manipulating consumer decisions is to exceed that proper role and is inconsistent with this Court's teachings under the First Amendment.

These principles apply equally when the advertising speech concerns legal products or services that may be seen by some as "immoral." If the Court were to adopt Petitioners' position that speech about legal but ostensibly "bannable" products or services can be regulated or forbidden without First Amendment constraint, commercial speech prohibition would be permissible at the majoritarian whim of any government entity.

SUMMARY OF ARGUMENT

The Court has long upheld the First Amendment's protection of commercial speech and has placed the burden on the government to justify attempted encroachments

* Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

upon it. The four-part test articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), carefully balances governmental interests against the constitutional protection given to commercial speech. The government must comply with each of the four prongs of the *Central Hudson* test.

The restrictions on lottery advertising urged by Petitioners in this case fail the *Central Hudson* test because they are not "narrowly tailored" and fail to "directly advance" the asserted governmental interest. Petitioners describe this interest as discouraging lottery participation in states that do not sponsor lotteries, while at the same time accommodating lottery promotion in states that do. Application of the restrictions to Respondent, however, does not serve this interest. Instead, the effect of these restrictions is to deprive Virginia listeners of the opportunity to hear promotions for Virginia's lottery, while listeners in this Respondent's region of North Carolina are inundated daily with Virginia lottery promotions in television, radio, and newspaper advertising originating in Virginia.

On a broader scale, the fact that the advertisements at issue in this case concern the controversial topic of state lotteries should increase, not diminish, the level of First Amendment protection. Suppressing commercial speech in order to protect citizens from the presumed evils of lottery advertising, is inconsistent with this Court's strong pronouncements against such paternalism and in favor of more, not less, information as the appropriate means to encourage informed economic decision making.

Speech about legal state lotteries should not be relegated, as the Government argues, to a new and lesser subcategory of speech. It is fundamental to the First Amendment rationale for commercial speech protection that "if [commercial speech] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions

as to how that system ought to be regulated or altered." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Advertising concerning state lotteries fulfills both of these functions. Obviously, it tells the public what kind of legal games are available and where, but it also reaches those who are adamantly opposed to state lotteries. Actual lottery advertising provides the most direct information about state lottery activities to both groups of voters, whose individual decisions will determine whether and to what extent a state should adopt state-sponsored lotteries.

Petitioners' reliance on *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), to cure their failure to meet *Central Hudson* is equally misguided. *Posadas* differs from the instant case in several critical respects: *Posadas* involved a facial challenge, whereas the instant case challenges the regulations as applied; the regulations in *Posadas* were held to be "narrowly tailored" under the *Central Hudson* test, whereas the Petitioners here suggest that *Posadas* excuses application of the test altogether because the *activity* of gambling, although lawful in this case, could be banned. More fundamentally, however, the statement cited by Petitioners in support of this view not only is dictum, but has been widely and sharply criticized. The concept that because government can ban an *activity*, it is permited to ban *speech about* the activity, cannot withstand First Amendment scrutiny and should be rejected by the Court.

Allowing First Amendment protection for commercial speech to ride solely upon the decision of lawmakers as to which activities they may or may not wish to ban at a given time, removes the responsibility for guarding free speech from the Court and relegates it to the protection of majoritarian legislative whim. This is precisely what the First Amendment does not allow.

ARGUMENT

I. COMMERICIAL SPEECH IS PROTECTED BY THE FIRST AMENDMENT.

The Court has long recognized the unique informational value of commercial speech in our society and held that it is unquestionably protected by the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As the Court stated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985):

> There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment. . . .

That constitutional protection has been repeatedly affirmed by the Court against a variety of asserted state interests.[1]

In these cases, the Court has recognized that there is both a right to advertise and a reciprocal right to receive commercial information in advertising form. *Virginia State Board*, 425 U.S. at 757. Thus, commercial speech serves more than the economic interests of the speaker; it "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson*, 447 U.S. at 561-562. Consumers' interest in commercial speech may well be greater than their interest in "the day's most urgent political debate." *Virginia*

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[1] *See, e.g., Peel v. Attorney Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

State Board, 425 U.S. at 763. Similarly, society as a whole has an interest in the free flow and exchange of commercial information. As the Court noted in *Virginia State Board*, our free enterprise economy is driven by the private economic-decision making of individuals, and "[i]t is a matter of public interest" that individuals have the information necessary to make intelligent and well-informed decisions. *See id.* at 765. "To this end, the free flow of commercial information is indispensable." *Id.*

The Court has rejected the "highly paternalistic approach" of trying to protect the public by manipulating the information it receives. *See Virginia State Board*, 425 U.S. at 770. The Court's insistence on more speech rather than less is based upon fundamental assumptions about the American public that are central to all First Amendment jurisprudence: our citizens are assumed to be intelligent, mature, and collectively capable of making their own choices if provided with adequate information. As the Court stated in *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977): "[W]e view as dubious any justification that is based on the benefits of public ignorance." 433 U.S. at 375.

Advertising of state-sponsored lotteries is commercial speech no less deserving of First Amendment protection than any other advertisements. At the most immediate level, the lottery advertising prohibited in a balkanized fashion by these statutes conveys useful commercial information. It tells the public what kind of legal lottery games are available and where, the stakes involved, and the identity of the sponsoring state. The Court acknowledged the public's legitimate interest in all such information in *Virginia State Board*, 425 U.S. at 765:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

That a subject matter is controversial and may be a hotly debated policy issue among the citizens of a state, enhances rather than diminishes the need for First Amendment protection. Lotteries are at the center of just such a debate. The number of states deciding to sponsor lotteries has sharply increased in recent years. Proponents view state lotteries as a legitimate means of entertainment and as a way to raise government funds for significant social priorities without inviting public protests against new taxes. Opponents view them as an evil for the poorest members of society, who are enticed to participate in such activities against their better interests and to their detriment.

The federal government's stated interest in the statute at issue is that of upholding the policy choices of states, such as North Carolina, that have chosen not to conduct state lotteries. This overlooks a simply but critical point. It is not the "state" in the abstract that makes these policy choices, but the citizens who reside there. If the citizens of North Carolina have decided until today that they do not wish to have a state lottery, they are perfectly free to decide tomorrow that they will institute one. In a dynamic and changing society, where all citizens are presumed to be intelligent decision makers, depriving those citizens of information necessary to debate and alter public policy hamstrings their ability to perceive and ultimately to make better political choices.

Without lottery advertising, the public is deprived of an important source of information about lotteries for which it cannot practically rely on the occasional news story or editorial. The true extent and character of state lotteries and how they appeal to the public are best conveyed by the sponsors' own announcements in broadcast and print advertising. In the present case, the effect of the government's position would be to deprive the citizens of these contiguous regions of North Carolina and Virginia of this information on radio advertising from a major regional broadcaster, where there are absolutely

no legal limits on such information crossing the state border in newspapers, magazines, or other broadcast media, originating in Virginia.

Lottery advertising is a form of speech well within the protection of the First Amendment, and the government's attempt to keep it from the public is based solely on the "public ignorance" justification flatly rejected by the Court in *Bates*, 433 U.S. at 375. As Justice Brandeis stated in *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring):

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

II. THE GOVERNMENT BEARS THE BURDEN OF JUSTIFYING ENCROACHMENTS UPON PROTECTED SPEECH.

A. The Government Must Meet Each of the Four Parts of the *Central Hudson* Test.

In *Central Hudson*, 447 U.S. at 566, the Court distilled a carefully balanced doctrine and analytical test from the reasoning of a substantial body of earlier cases concerning commercial speech.[2] The now familiar four-

[2] *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979) (government may ban forms of commercial speech lacking informational content and more likely to deceive the public than to inform it); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (speech cannot be denied First Amendment protection merely because its source is a corporation rather than an individual); *In re Primus*, 436 U.S. 412 (1978) (state cannot use anti-solicitation rules to prohibit attorney from offering free services to potential client); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978) (state may ban oppressive in-person lawyer solicitation); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ordinance prohibiting placement of "For Sale" signs by homeowners in order to advance governmental objective of racially integrated neighborhood was unconstitutional); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (First Amendment prohibits state from suppressing contraceptive advertisements); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (blanket suppression of advertising by attorneys of routine legal services violates the First Amendment); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (impermissible under First Amendment for state to infringe upon newspaper's right to publish commercial advertisement conveying abortion information); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973) (government may ban commercial speech constituting illegal activity).

part test to determine whether government regulation or restriction of commercial speech is permissible was articulated by the Court as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The reasoning and practical application of the test announced in *Central Hudson*, are not unlike the approaches developed by the Court in other areas of protected speech, with the significant difference that under Part One of *Central Hudson*, misleading, false or illegal commercial speech may be regulated or banned. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 377 (1968) (conduct combining "speech" and "non-speech" elements can be regulated if: the regulation is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the

furtherance of that interest). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (government may impose reasonable restrictions on time, place, or manner of protected speech in a public forum, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

Clearly, *Central Hudson* has become part of the mainstream of First Amendment jurisprudence. Since its formulation, the Court has relied upon the four-part test to probe government efforts to ban commercial speech and to reject those efforts where the government fails to meet all parts of the test. *See, e.g., Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990); *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989);[3] *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Metromedia v. San Diego*, 453 U.S. 490 (1981).

The critical assumption of the four-part test is that the government—not the party whose speech the government seeks to inhibit—bears the burden of proof under *Central Hudson*. The assignment of this burden to the government was implicit in *Central Hudson*. ("In the absence of a *showing* that more limited speech regulation

[3] In *S.U.N.Y. v. Fox*, the Court adopted a modified application of the fourth prong of the *Central Hudson* test. While affirming *Central Hudson*'s requirement that the restrictions be "narrowly tailored," the Court held in *S.U.N.Y. v. Fox* that the "fit" between the legislature's ends and the means chosen to accomplish them, must be reasonable and the cost "carefully calculated." Moreover, the scope of the restrictions must be "in proportion to the interest served," *S.U.N.Y. v. Fox*, 492 U.S. at 480, citing *In re R.M.J.*, 455 U.S. 191, 203 (1982).

would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.") 447 U.S. at 571 (emphasis added). Since *Central Hudson*, the Court has repeatedly reiterated that government bears this burden.

Most recently, in *Peel v. Attorney Disciplinary Comm'n*, the Court noted the "constitutional presumption favoring disclosure over concealment" and the government's burden of rebutting this presumption. *See Peel*, 496 U.S. at 111. The Court in *Peel* recognized the government's "heavy burden" of justifying its prohibition of accurate factual information. *Id.* at 109.

Indeed, placement of this burden upon the government is the *sine qua non* of the First Amendment ("Congress shall make no law. . . .") and fully consistent with other First Amendment cases where the government has sought suppression of fully protected speech. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958). *See also S.U.N.Y. v. Fox*, 492 U.S. at 480 ("State bears the burden of justifying its restrictions" and must "affirmatively establish" the reasonable fit). As the Court stated in *Zauderer*, 471 U.S. at 647:

> [T]he burden is on the State to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest. . . .

Thus, consistent with another basic assumption under the First Amendment that some accurate information is always better than none at all, *Central Hudson*, 447 U.S. at 562, it is the *government* which must come forward to demonstrate why speech that is neither false, misleading, nor illegal should be suppressed.

B. The Statutes at Issue, as Applied to Edge Broadcasting, Fail the *Central Hudson* Test.

The restrictions challenged by the Respondent, 18 U.S.C. §§ 1304 and 1307, as applied to Respondent, are

not a "narrowly tailored fit" and fail to "directly advance" the governmental interest asserted. This application of the regulations thus fails both the third and fourth prongs of the *Central Hudson* test and consequently is unconstitutional.

Sections 1304 and 1307 lack any semblance of the narrow tailoring required by *S.U.N.Y. v. Fox*. The government's asserted objectives are to discourage lottery participation in States that do not sponsor lotteries, while accommodating lottery participation in States that do. Brief for Petitioners at 31. Essentially, the statute's asserted goal [4] is to reduce the volume of lottery advertising in states such as North Carolina and permit virtually unlimited promotion of such advertising in states such as Virginia. A "tailored" regulation would need to focus, at least to some extent, on whether application of the regulation directs lottery advertising to the appropriate *audience*. Only by drawing some link between the lottery advertising at issue and the ultimate audience or destination, would one hope to achieve the desired objective.

As the Petitioners have repeatedly stressed, however, §§ 1304 and 1307 create a "bright-line geographic rule" under which a "station's right to broadcast lottery advertising hinges on the State to which it is licensed." Brief for Petitioners at 2. The "bright-line" nature of the regulations may have made them relatively easy to draft or apply, but they are hardly "tailored" to achieve the

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[4] The government has assumed *a fortiori* that by reducing the lottery advertising reaching citizens of non-lottery states, the interest of non-lottery state citizens in gambing will be reduced. The paternalistic reasoning underlying this assumption, conflicts with the constitutional presumption in favor of more speech, as discussed above. Moreover, it rests on the dubious belief that the best way to "guide" citizens in their economic and public policy choices is to deprive them of "immoral" information. Aside from obvious First Amendment concerns, this belief is unsupported by any shred of empirical evidence.

asserted goals.[5] Unlike the statute upheld in *Posadas*, which at least attempted to focus its restrictions on the nature of the audience, the impliedly vulnerable citizens of Puerto Rico,[6] the statutes challenged here focus only on the state in which the station's broadcast frequency is licensed, totally without regard to the actual physical location of the entity broadcasting the advertisement, the reach of its signal, or the advertisement's ultimate audience.

The effect of these "bright-line" regulations is that by focusing only on the physical locale of the broadcaster's license, they cast a net that is not only far too wide, but is also ineffective, in violation of both the third and fourth prongs of *Central Hudson*. The effect of the regulations is to permit listeners to be deprived of lottery advertising who should not be, while allowing other listeners in non-lottery states to hear lottery advertising, solely because of the physical location of the broadcasting source. Any law that sweeps this broadly and blindly on the facts of this case cannot meet the standards of the fourth prong of *Central Hudson*.

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[5] As expressed by Justice Marshall in his concurrence in *Peel*, 496 U.S. at 117, n.1:

> this Court's primary task in cases such as this is to determine whether a state law or regulation unduly burdens the speaker's exercise of First Amendment rights, not whether respect for those rights would be unduly burdensome for the State.

[6] The Court in *Posadas* accorded special deference to Puerto Rico law and culture, 478 U.S. at 339, n.6:

> A rigid rule of deference to interpretation of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico. *See Diaz v. Gonzalez*, 261 U.S. 102, 105-106 (1923) [parallel citations omitted] (Holmes, J.). ("This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concerns. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here.").

See also Posadas, 478 U.S. at 332-336.

Not surprisingly, the "bright-line" regulations challenged by the Respondent also fail to "directly advance the governmental interest asserted," as required by the third prong of *Central Hudson*. *See Central Hudson*, 447 U.S. at 566. Rather than decreasing lottery advertising in North Carolina and permitting maximum promotion in Virginia, the regulations as applied to the Respondent have an almost *contrary* effect: the prohibition has little, if any, effect of discouraging lottery participation in North Carolina, and does nothing to accommodate the promotion of lottery participation in Virginia. Assuming again that there is a link between increasing or decreasing advertising and increasing or decreasing the public's interest in state lotteries, the direct effect of the regulations here has been very different from what the government argues was intended.

Respondent's radio station, WMYK (promoted and known as "Power 94"), reaches listeners who are primarily in Virginia. In fact, 92.2% of Power 94's listeners live in Virginia and only 7.8% live in North Carolina. *See Edge Broadcasting Co. v. United States*, 732 F. Supp. 633, 639-641 (E.D. Va. 1990). By prohibiting Respondent from broadcasting Virginia State lottery information, the statute deprives Virginia residents of the opportunity to hear promotions for their state-sponsored lottery—the opposite effect of what the statute was allegedly supposed to "accommodate" for one of the now numerous state-sponsored lotteries.

Have the regulations "directly advance[d]" the government's other asserted interest in discouraging the public's interest in gambling by reducing North Carolinians' knowledge of the Virginia lottery? The district court found that they have not. *See Id.* Power 94's broadcast reaches only nine counties in North Carolina, the total population of which is 127,000. The effect of preventing Power 94 from broadcasting lottery advertisements, however, has had only a minimal effect on even

these 127,000 residents. As the district court noted, most residents in Power 94's nine county service area already listen to broadcasts of Virginia-based radio stations, view Virginia-based television, and read Virginia newspaper advertising. *See Id.* at 640. Thus, residents in Power 94's service area receive a heavy volume of Virginia lottery advertisements despite the statute's prohibition of their being broadcast by Power 94. As the district court found: "38% of the radio listening in the Power 94 service area is directed at stations which broadcast lottery advertising." *Id.* This accounts only for the lottery advertising that reaches residents in Power 94's area by *radio*; it does not include the number of residents in Power 94's area who receive other forms of lottery advertising. The district court squarely found that the residents in Power 94's service area receive "most of their radio, newspaper and television communication from Virginia-based media," rendering any "advance" achieved by the statute marginal at best. *Id.* at 639.

Central Hudson and its progeny make clear that a regulation does not "directly advance" the governmental interest "if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564. And, while the government may argue that there may be a few North Carolina residents who are completely insulated from lottery advertising as a result of the prohibition on Power 94's broadcasting, the Court has stated that "conditional and remote eventualities simply cannot justify silencing . . . promotional advertising." *Id.* at 569. *See also Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 73 (statute fails third prong of *Central Hudson* test where it "provides only the most limited incremental support for the interest asserted."). Attempts to justify the ineffectiveness and loosely-tailored nature of the restrictions here as the "only means"—or even as a rational means—of effectuating the asserted governmental interests should be rejected out of hand.

III. PETITIONERS' RELIANCE ON *POSADAS* IS MISPLACED.

The government attempts to draw analogies from *Posadas* to the situation presented in this case. *Posadas*, however, does not relieve the government of its failure to meet the burden imposed by *Central Hudson*. The appellee in *Posadas*, Tourism Company of Puerto Rico, demonstrated to the Court's satisfaction that it complied with the four prongs of the *Central Hudson* test. The Petitioners must meet this same burden here. In addition, although *Posadas* may have factual similarities to this case, it is distinguishable, as discussed below. Also, Petitioners rely primarily on statements made in dictum in *Posadas*, which not only lack precedential value, but are based on reasoning that has been roundly criticized by First Amendment scholars and judges.

A. Petitioner's Cited Dictum From *Posadas* Is at Odds With Basic Principles of the First Amendment.

Petitioners rely heavily on an observation made in *Posadas* that it would be:

> a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Posadas, 478 U.S. at 346.

The reasoning of this dictum, however, has been sharply questioned.[7] In his dissenting opinion, Justice

[7] *See, e.g., Posadas*, 478 U.S. 328, 355 n.4 (J. Brennan, dissent); Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing; 'Twas Pitiful, 'Twas Wondrous Pitiful."*, 1986 *Sup. Ct. Rev.* 1, 12-13 (Court's statement violates "every notion of what the Free Speech Clause has stood for" and is a "perversion of First Amendment law"); Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 *Virginia Law Review* 627 (May, 1990) ("[I]t is not clear that the power to regulate a specific economic activity necessarily comprises the power to regulate speech about that activity. After all, the Constitution does not forbid legislation abridging the freedom of gambling; it does forbid legislation abridging the freedom of speech.")

Brennan had the following response to Chief Justice Rehnquist's statement in the majority opinion:

> [T]he "constitutional doctrine" which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint—it is called the First Amendment.

Posadas, 478 U.S. at 354, n.4 (J. Brennan, dissenting).

A cursory review of the *Posadas* opinion shows that the cited statements are dicta. Indeed, the Court in *Posadas* affirmed the continuing vitality of *Central Hudson* and applied its four-part test in concluding that the unique Puerto Rico statute at issue "pass[ed] muster under each prong of the *Central Hudson* test." *Posadas*, 478 U.S. at 340-344. It was on this basis that the Court then stated: "We therefore *hold* that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim." *Id.* (emphasis added).

It is in the paragraphs following this holding that the observations occur which are now cited and relied upon by the government as the linchpin of its First Amendment argument to this Court. *See Id.* at 345-346. The statements are dicta, and rest upon reasoning that is at fundamental variance with First Amendment jurisprudence.

The cited dictum is problematic for several reasons. First, the constitutional doctrines and tests for determining whether speech can be regulated are distinct from and far more stringent than those for determining whether activities can be prohibited or regulated. If actually accepted as a part of First Amendment doctrine, the statement would turn the question of whether a par-

ticular form of speech can be regulated into whether the *activity* which the speech concerns can be regulated. Blending these separate analyses into one would eradicate the First Amendment's protection of commercial speech, not just about state lotteries but about a virtually unlimited range of products and services. Permissible government regulation reaches practically every aspect of life, and therefore most commercial speech could be characterized as having a potential impact on the demand for or the acceptability of a regulable product or activity. If this were the rule, commercial speech protection would be reduced to a nullity. As Professor Kurland argued:

> If all that is needed to erase the protections that Cardozo once described as fundamental to our liberties is to subsume speech under actions, our liberties are truly endangered.

Kurland, *Posadas de Puerto Rico*, 1986 *Sup. Ct. Rev.* at 14.

When carried to its logical extreme and applied to a legion of different products and activities, the radical nature of this reasoning becomes clear: For example, municipalities surely have the right to regulate the height of buildings and often, in fact, prohibit the activity of building tall buildings. Under the Court's logic, since city X *could* ban tall buildings altogether, it could prohibit a newspaper from carrying a contractor's advertisement discussing the contractor's ability to build tall buildings.

Essentially, if the Court were to merge the unrelated and incomparable analyses for the regulation of speech and products or activities, the Court would effectively wash its hands of the protection of commercial speech, leaving it to legislative mercy rather than to the constitutional oversight of the courts. Simply put, the protection of a given form and topic of commercial speech would depend not on First Amendment principles, but upon determination by legislators as to which activities may

be prohibited or regulated, with speech regulation relegated to being the tail of the dog.[8]

Further, under a related *Posadas* dictum, also relied on by Petitioners. *see* Brief for Petitioners at 40, n.19, only if the underlying product or activity is "constitutionally protected" can one be assured that related commercial speech will not be prohibited.[9] Any category of

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[8] Justice Stevens reiterated the importance of court review of legislative restriction of commercial speech for the plurality in *Peel*, 496 U.S. at 108-109:

> Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise de novo review. *Cf. Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 498-511 [parallel citations omitted] (1984). That the judgment below is by a State Supreme Court exercising review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity. *See e.g., Baird v. State Bar of Ariz.*, 401 U.S. 1 [parallel citations omitted] (1971). The Commission's authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 [parallel citations omitted]; *Central Hudson Gas & Electric Corp.*, 447 U.S. at 562 [parallel citations omitted]. Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden to justify a categorical prohibition against the dissemination of accurate factual information ot the public.

[9] Petitioners cited the following statement in *Posadas*:

> We think appellant's argument ignores a crucial distinction between the *Carey* and *Bigelow* decisions in the instant case. In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the state. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely

"constitutionally protected" products or services would be problematic and at best narrow in scope. Perhaps religious literature, contraception and abortion services would qualify currently, but even those may depend on shifting constitutional doctrines. The concept underlying both of these *Posadas* dicta appears to be that commercial speech can be "immoral" or lead to "undesirable" conduct; lottery advertising may encourage citizens to gamble or behave in some other way that the government believes is not in their best interest. This line of thinking directly conflicts with the First Amendment's fundamental respect for individual choice and for citizens' *ability* to make choices. In another context, the Court has developed the "clear and present danger" doctrine to address "dangerous" speech. To allow the prohibition of speech about legal products that may lead to what some may consider immoral conduct, would undermine and substantially shrink the First Amendment.

B. *Posadas* Involved a Facial Challenge, Whereas the Instant Case Challenges the Statute As Applied.

Respondent Edge Broadcasting, has successfully challenged 18 U.S.C. §§ 1304 and 1307 *as applied* to it alone. It is not challenging the statute facially as it may potentially be applied to others. Unlike Edge Broadcasting, the appellant in *Posadas* brought a *facial* challenge to the Puerto Rico ordinance. The burden of making a successful facial challenge under the First Amendment is much more stringent, and the chance of prevailing is consequently lower, than in an as-applied challenge involving the same facts. *Cf. S.U.N.Y. v. Fox*, 492 U.S. at 482-485.

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ban casino gambling necsesarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.

Posadas, 478 U.S. at 345-346.

A petitioner challenging a statute as applied to it, need only show that its acts "fall outside what a properly drawn prohibition would cover." *Id.* at 482. An appellant seeking to prove that a statute is unconstitutional on its face must demonstrate that "the statute's overreach is *substantial*, not only as an absolute matter," but also as compared with the legitimate applications of the statute. *Id.* at 485 (emphasis in original); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The implications of this difference in the context of *Posadas* are evident: because an appellant failed to meet the higher burden of proving that a statute was unconstitutional on its face, does not demonstrate that another appellant should not prevail when seeking only to distinguish a speech ban applicable to it from the broader purpose of the statute, under the applicable First Amendment test. Put differently, despite the fact that the appellant in *Posadas* was unable to prevail on its facial challenge, another casino operator in Puerto Rico might be entitled to a different result in a challenge to the statute as applied.

C. The Statute at Issue in *Posadas* Was Held To Be Narrowly Tailored to Its Intended Audience.

Unlike §§ 1304 and 1307, the statute at issue in *Posadas* as finally interpreted by the Puerto Rico courts, at least attempted to serve a governmental interest in reducing local citizen participation in Puerto Rico's casino gambling. The statute prohibited casino advertisements targeted at citizens of Puerto Rico but permitted advertisements targeted at nonresident tourists.[10] The governmental interests asserted in this case by the government are that of "discouraging lottery participation in the States that do not sponsor lotteries *and* accommodating lottery participa-

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[10] Again note the special deference afforded "unique" Puerto Rican law and culture in *Posadas*. *See* fn. 6, *supra* at 13. This is another distinguishing feature of that case.

tion and promotion in the States that do." Brief for Petitioners at 31 (emphasis in original). To this end, 18 U.S.C. §§ 1304 and 1307 prohibit lottery advertisements to be broadcast from a state that does not sponsor lotteries but permit lottery advertisements to be broadcast into a non-lottery state from a lottery-sponsoring state.

Both sets of statutes seek to limit what reaches the ears of a particular group by prohibiting advertising. However, whereas the Puerto Rico statute at least focuses on what is being directed towards residents of Puerto Rico while encouraging the flow of lottery promotion to non-resident tourists, the statute before the Court in the present case focuses only on the physical location of the entity broadcasting the advertisement, without any regard for the intended audience, which leads to the bizarre and unconstitutional results in this case.

IV. THE GOVERNMENT'S PROCLIVITY TO EXPAND ITS REGULATORY ROLE AT THE EXPENSE OF PROTECTED SPEECH SHOULD BE RESISTED.

In its recounting of the rollercoaster history of congressional expansion and contraction of the Anti-Lottery Act of 1890 ("the Act") and subsequent related statutes, *see* Brief for Petitioners at 15-18, the government cites two cases whose parallel histories—not included by Petitioners—reveal the consistently aggressive posture taken by the United States in asserting the broadest possible applicability of the Act, and its disregard for fundamental First Amendment constraints in this context. In each case, the government's position engendered a dissent from this Court's per curiam decision that subsequent congressional enactments had rendered moot the government's appeal from a lower court decision imposing First Amendment limits on the scope of federal power under the Act.

In *New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3rd Cir. 1974) (en banc), *cert. granted*, 417 U.S. 907 (1974), *vacated and remanded*, 420 U.S. 371 (1975), the circuit court concluded that § 1304 of the Act could not be constitutionally applied under the First Amendment to ban broadcasting news reports of lottery winners:

> The contention that . . . the winning number in the New Jersey Lottery is not "news", in a broadcast context, is simply frivolous. . . . The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news. . . .

491 F.2d at 222. However, the United States petitioned for certiorari, which was granted. *See* 417 U.S. 907 (1974). Subsequently, Congress passed § 1307 of the Act, which excludes information about certain legal state lotteries from § 1304. On that basis, this Court remanded the case to the circuit court to determine whether the matter was moot. *United States v. New Jersey Lottery Comm'n*, 420 U.S. 371 (1975). Justice Douglas dissented, stating, in part:

> With all respect, I do not believe that this case has become moot—certainly not for the reasons intimated by the Court. The First Amendment provides that Congress shall make no law abridging the freedom of the press. It is to me shocking that a radio station or a newspaper can be regulated by a court or by a commission, to the extent of being prevented from publishing any item of "news" of the day. So to hold would be a prior restraint of a simple and unadulterated form, barred by constitutional principles. Can anyone doubt that the winner of a lottery is prime news by our press standards?

420 U.S. at 374.

In a strikingly similar situation, the federal district court in Minneapolis held that § 1302 of the Act was impermissible under the First Amendment as applied to prize lists in news reports. *Minnesota Newspaper Ass'n v. Postmaster General*, 667 F. Supp. 1400 (D. Minn.

1987), *vacated*, 490 U.S. 225 (1989). The district court permanently enjoined the United States from further enforcement of the restriction on prize lists as an impermissible prior restraint on the editorial decision making process.

> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Natl. Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 1010 (1940)). The interests here asserted do not justify imposing the fear of subsequent punishment on an editor who decides to publish a lottery prize list. "The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press. . . ." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 358 [parallel citations omitted] (1974).

677 F. Supp. at 1407. After the district court decision, Congress passed legislation changing the scope of § 1302, and the plaintiff newspaper association dismissed its appeal to this Court challenging § 1302 under the commercial speech doctrine of the First Amendment. *See* 488 U.S. 815 (1988). However, the United States declined to dismiss its cross-appeal, ultimately requiring this Court to hold that the government's case had been mooted by Congress' action. *Frank v. Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989). Justice Stevens, in an opinion parallel to Justice Douglas' dissent in *New Jersey State Lottery Comm'n v. United States*, dissented:

> In my opinion the Government's concession is a reason for affirming, rather than vacating the judgment of the District Court insofar as it enjoins the Postmaster General from enforcing § 1302 [18 USCS § 1302] as applied to prize lists. I therefore respectfully dissent.

490 U.S. at 227. As these two cases indicate, and as is further evidenced by the present case, Petitioner United States has been exceedingly slow to recognize clear First Amendment constraints on the exercise of legislative and regulatory power over lottery speech, commercial or noncommercial, imposed by the unambiguous precedents of this Court.

It is striking that three different government entities, including the United States, have successfully petitioned for certiorari in three separate commercial speech cases this term, in each case seeking a narrow reading of the *Central Hudson* four-part test. We respectfully submit that this Court should carefully consider the collective implications of these cases under the First Amendment.

In *City of Cincinnati v. Discovery Network, Inc.*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, —— U.S. ——, 112 S. Ct. 1290 (1992), the City of Cincinnati asserts that Part Four ("least restrictive fit") of *Central Hudson* was improperly applied by the Sixth Circuit, and asks that this Court dilute its interpretation of Part Four in *S.U.N.Y. v. Fox*, to require only a "sufficient basis" for government's "believing" that its goals of aesthetics and safety could be met by the commercial handbill ban.

In *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *cert. granted*, —— U.S. ——, 112 S. Ct. 2272 (1992), the State of Florida petitioned for certiorari in a case in which the Circuit held that the State's ban on in-person solicitation by CPA's was not a sufficiently narrowly tailored "fit" under *S.U.N.Y. v. Fox*, and that the State had failed its constitutional burden of showing that existing regulatory requirements were not sufficient to serve that interest. The State's petition argued flatly that Part Four should require only that the State's concerns (policing the professions and protecting the public's ability to rely on the objectivity of CPA's) be advanced in a rational way by the regulation.

This instant case is therefore only the latest example of aggressive governmental attack on the substance of the *Central Hudson* test. If the positions argued by Petitioners in any of these three cases were to be accepted uncritically by the Court, the constitutional balance crafted by the Court in *Central Hudson*, and reiterated by the Court not only in *Posadas*, but also in its post-*Posadas* decisions in *Shapero*, *S.U.N.Y. v. Fox*, and *Peel*, would have little remaining substance, and the Court's commercial speech doctrine would have no remaining force as an effective limit on government regulation of advertising speech.

CONCLUSION

Amici Curiae respectfully submit that Respondent's case for as-applied unconstitutionality of 18 U.S.C. §§ 1304 and 1307 is compelling; it is hard to conceive of a stronger factual record. We urge this court to affirm the decision below, and to reaffirm constitutional protection for commercial discourse in our society.

Respectfully submitted,

P. CAMERON DEVORE *
MARSHALL J. NELSON
SIMA F. SARRAFAN
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

Of Counsel:

HENRY L. BAUMANN
Executive Vice President
and General Counsel
STEVEN A. ROOKSHESTER
Associate General Counsel
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 "N" Street, N.W.
Washington, D.C. 20036
Attorneys for National Association of Broadcasters

JOHN KAMP
AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES, INC.
1899 L Street, N.W.
Washington, D.C. 20036
Attorney for American Association of Advertising Agencies, Inc.

STEVEN R. SHAPIRO
JOHN A. POWELL
AMERICAN CIVIL LIBERTIES UNION
132 West 43 Street
New York, NY 10036
Attorneys for American Civil Liberties Union

STUART D. KARLE
DOW JONES & COMPANY, INC.
200 Liberty St.
New York, NY 10028
Attorney for Dow Jones & Company, Inc.

BARBARA W. WALL
GANNETT CO., INC.
1100 Wilson Boulevard
Arlington, Virginia 22234
Attorney for Gannett Co., Inc.

VICTOR F. GANZI
ROBERT J. HAWLEY
THE HEARST CORPORATION
959 8th Ave.
New York, NY 10019
Attorneys for The Hearst Corporation

KENNETH M. VITTOR
SLADE R. METCALF
C/O MAGAZINE PUBLISHERS OF
AMERICA, INC.
575 Lexington Ave.
New York, NY 10022
Attorneys for Magazine Publishers of America, Inc.

RICHARD E. WILEY
DANIEL E. TROY
WILEY, REIN & FIELDING
1776 "K" Street, N.W.
Washington, D.C. 20006
Attorneys for The Media Institute

DAVID P. FLEMING
Vice President and General
Counsel
MULTIMEDIA BROADCASTING
COMPANY
701 E. Douglas, Union Station
Wichita, KS 67202
Attorney for Multimedia Broadcasting Company

ROBERTA R. BRACKMAN
NATIONAL BROADCASTING
COMPANY, INC.
30 Rockefeller Plaza
Room 1022
New York, NY 10112
Attorney for
National Broadcasting
Company, Inc.

JOHN F. STURM
RENÉ P. MILAM
NEWSPAPER ASSOCIATION OF
AMERICA
11600 Sunrise Valley Dr.
Reston, VA 22091
Attorneys for Newspaper
Association of America

WADE H. HARGROVE
MARK J. PRAK
THARRINGTON, SMITH & HARGROVE
209 Fayetteville Street
Raleigh, N.C. 27602
Attorneys for North Carolina
Association of Broadcasters,
Inc.

L. STANLEY PAIGE
POST-NEWSWEEK STATIONS, INC.
1150 15th Street, N.W.
Washington, D.C. 20071
Attorney for Post-Newsweek
Stations, Inc.

MICHAEL B. ISAACS
PROVIDENCE JOURNAL COMPANY
75 Fountain St.
Providence, RI 02902
Attorney for Providence
Journal Company

BRUCE W. SANFORD
HENRY S. HOBERMAN
ROBERT D. LYSTAD
BAKER & HOSTETLER
Washington Square
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for the Society of
Professional Journalists

HARRY M. JOHNSTON III
TIME INC.
1271 Avenue of the Americas
New York, NY 10020
Attorney for Time Inc.

DAVID D. HILLER and
CHARLES J. SENNET
TRIBUNE COMPANY
435 North Michigan Ave.
Suite 2010
Chicago, IL 60611
Attorneys for Tribune Company

MARTIN P. MESSINGER
BRYAN T. MCGINNIS
WESTINGHOUSE BROADCASTING
COMPANY, INC.
888 Seventh Ave., 39th Floor
New York, NY 10106
Attorneys for
Westinghouse Broadcasting
Company, Inc.

APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL AMICI

The National Association of Broadcasters ("NAB"), organized in 1922, is a nonprofit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information about the activities of government and other matters of public interest and concern, including advertising and other commercial information.

The American Association of Advertising Agencies ("A.A.A.A.") is a national trade association organized under the laws of the State of New York. A.A.A.A.'s membership is comprised of over 730 advertising agencies doing busiess throughout the United States. A.A.A.A. members create and place some 80 percent of all national advertising and substantial amounts of local and regional advertising. In addition, A.A.A.A. members provide a full range of marketing services to their clients, including product promotion, public relations, direct marketing, merchandising, design and packaging services. A.A.A.A. is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.

American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. Since its founding in 1920, the ACLU has consistently maintained that the First Amendment protects the free exchange of information between willing speakers and willing listeners, and has articulated that view in numerous appearances before this Court, both as direct counsel and as *amicus curiae*. Because this case involves a government effort to restrict the flow of truthful information to the

general public, it raises issues of direct concern to the ACLU and its members.

Dow Jones & Company, Inc., publishes, *inter alia*, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, *the Dow Jones News Services*, and, through its Ottaway Newspapers, Inc., subsidiary, newspapers in 29 communities in 13 states.

The Hearst Corporation is a diversified, privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and non-daily newspapers, business publications, hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

Gannett Co., Inc., is a nationwide news and information company that publishes 82 daily newspapers (including USA TODAY), a variety of non-daily publications (including USA Weekend, a newspaper magazine) and operates 10 television stations, 15 radio stations, a national news service and an outdoor advertising company.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership 196 domestic magazine publishers who publish over 800 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news and publish weekly, bi-weekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people, many of which publications carry substantial advertising content.

The Media Institute is a nonprofit, tax-exempt research foundation dedicated to promoting First Amendment protection for commercial speech, safeguarding of strong First Amendment protections in the laws and regulations

dealing with communications technologies, and preserving a robust, competitive, and unfettered press, both electronic and print.

Multimedia Broadcasting Company owns and operates television and radio stations in various markets throughout the country which engage in the sale of advertising.

National Broadcasting Company, Inc., itself and its subsidiaries, own and operate a national television network and television stations, all of which are engaged in the gathering and dissemination of news and advertising to the public.

The Newspaper Association of America ("NAA") represents approximately 1,525 daily newspapers representing more than 90% of the newspaper circulation in the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

The North Carolina Association of Broadcasters, Inc. ("NCAB") is a nonprofit corporation whose membership consists of some 200 radio and television stations located in North Carolina. As the only statewide trade association representing the broadcast industry in North Carolina, NCAB is interested, among other things, in issues relating to the ability of its members to broadcast advertisements relating to matters of commercial interest to the public.

Post-Newsweek Stations, Inc., through wholly-owned corporate subsidiaries, owns and is licensee of four network affiliated television stations: WDIV, Detroit, Michigan; WFSB, Hartford, Connecticut; WJXT, Jacksonville, Florida; and WPLG, Miami, Florida. Each of the governments in those states operates and advertises its state lottery.

Providence Journal Company owns and operates nine broadcast television stations; through its subsidiaries Colony Communications, Inc. and King Videocable Com-

pany operates cable television systems serving approximately 770,000 subscribers in nine states; and publishes newspapers in Providence, R.I. collectively known as The Journal-Bulletin.

The society of Professional Journalists, a voluntary, nonprofit organization, is the largest and oldest organization of journalists in the United States. Its members represent every branch and rank of print and broadcast journalism.

Time Inc. is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE, and ENTERTAINMENT WEEKLY.

Tribune Company is a communications company owning the *Chicago Tribune*, Orlando *Sentinel*, the Ft. Lauderdale *Sun-Sentinel*, the Escondido, California *Times-Advocate*, the Palo Alto *Times-Tribune*, the Newport News, Virginia *Daily Press*, television stations in Chicago, New York, Los Angeles, Denver, Atlanta, New Orleans and Philadelphia, and radio stations in Chicago, New York, Denver and Sacramento.

Westinghouse Broadcasting Company, Inc. is a diversified media company which, through its Group W Television and Group W Radio subsidiaries, is the licensee of five television stations and sixteen radio stations in major markets, and, through its Group W Satellite Communications subsidiary, is a national distributor of cable television programming. Group W station programs and Group W cable programs frequently include state lottery information or advertisements, or other promotional programming subject to state and federal regulation.